No. 89-1346

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AUTOMOBILE CLUB OF NEW YORK, INC. and AAA CLUBS OF NEW JERSEY,

Petitioners,

vs.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, PHILIP D. KALTENBACHER, ROBERT F. WAGNER, RICHARD C. LEONE, JAMES G. HELLMUTH, HENRY F. HENDERSON, JR., WILLIAM K. HUTCHISON, H. CARL McCALL, JOHN G. McGOLDRICK, WILLIAM J. RONAN, HOWARD SCHULMAN, ROBERT VAN BUREN and HAZEL FRANK GLUCK, as Commissioners of the Port Authority of New York and New Jersey,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOSEPH LESSER
(Counsel of Record)
The Port Authority of New York and New Jersey
One World Trade Center - 66N
New York, New York 10048
(212) 466-8754

On the Brief:
ARTHUR P. BERG
MILTON H. PACHTER
SHOLEM FRIEDMAN

QUESTION PRESENTED

The Port Authority of New York and New Jersey owns and operates an integrated cross-water Interstate Transportation Network linking Southern New York and Northern New Jersey. This Network includes four bridges, two tunnels, one bus terminal and one passenger rail crossing – the Port Authority Trans-Hudson Railroad (PATH).

On April 12, 1987, as a result of rising operating and maintenance costs accompanied by major capital requirements of the Network, the Commissioners of the Port Authority, pursuant to their statutorily granted powers, raised the tolls on the Authority's six vehicular crossings and the fare on PATH. Revenues from these increases are being used to accommodate growth and relieve congestion in the Network, with capital improvements planned for the bridges, tunnels, bus terminal and PATH.

Petitioners challenged the increase in bridge tolls, claiming that the higher tolls were not "just and reasonable" as required by §135(i) of the Federal-Aid Highway Act of 1987, 33 U.S.C.A. §508 (West Supp. 1989). Although petitioners conceded that the "just and reasonable" provision permits the inclusion of bridge-related facilities in the Port Authority's rate base for the purpose of assessing the reasonableness of its bridge tolls, and did not dispute the inclusion of such non-bridge facilities as the tunnels and bus terminal, petitioners argued that PATH, which is part of the Port Authority's Interstate Transportation Network, should have been excluded from the rate base. Petitioners admit that with PATH in the rate base, the Port Authority's rate of return is reasonable.

The question presented is whether the Court of Appeals was correct in affirming the District Court's essentially factual finding that the Port Authority's interstate passenger rail crossing, PATH, is bridge-related, since it provides a substantial benefit to the users of the Port Authority's bridges, and, therefore, is properly includable in the rate base.

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COUNTERSTATEMENT OF THE CASE

The Port Authority of New York and New Jersey is a direct agency of the two states created by an interstate compact to which Congress consented (Ch. 154, Laws of N.Y., 1921; Ch. 151, Laws of N.J., 1921; 42 U.S. Stat. 174 (1921)). The Port Authority, pursuant to the 1921 Compact

and subsequently enacted bi-State legislation, operates various terminal, transportation and other facilities of commerce in the statutorily defined Port District, including an integrated cross-water Interstate Transportation Network which includes four bridges, two tunnels, a bus terminal and a rail crossing (PATH).

As noted by the Court of Appeals, "[m]ost of the relevant facts were stipulated by the parties" (A-11)[1], including the fact that the Port Authority's bridges, tunnels, bus terminal and PATH are all involved in the movement of people across the interstate waters of the Port District and together make up the Port Authority's Interstate Transportation Network.

By virtue of its more than sixty years experience in interstate cross-river transportation in the Port District, the Port Authority has found that the efficient and cost-effective functioning of its interstate transportation facilities requires their maintenance and operation as an integrated, interdependent transportation system. It is undisputed that closing one or more of the Port Authority's cross-water facilities results in a "spillover" or "domino" effect, increasing congestion in the others, and that improvements to one facility benefit the users of the others by reducing congestion and making the entire system more efficient.

Both the District Court and the Court of Appeals found that this "spillover" effect established that the Port Authority's bridges, tunnels, bus terminal and PATH form an "integrated, interdependent transportation system" (A-19) and, therefore, justified the inclusion of PATH in the rate base. The Court of Appeals agreed with the

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[1] "A" followed by a designated page number refers to pages in the Petitioners' Appendix.

District Court's determination that "[m]easuring the relationship between river crossings [solely] by means of 'origin and destination' data [as urged by petitioners] . . . fails to take into account the full extent of the Port Authority's responsibilities" (A-25).

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the Court of Appeals has correctly resolved the narrow factual issue involved in this case, its decision does not conflict with any decision of this Court or that of any other court of appeals, and the case is of no national importance.

In view of the overwhelming and virtually uncontroverted evidence, as summarized in the Court of Appeals opinion, establishing that PATH is an integral component of the Port Authority's Interstate Transportation Network and, as such, provides a very real and substantial benefit to the users of the Port Authority's bridges, the courts below were clearly correct in holding that it was proper to include PATH in the rate base for purposes of considering the reasonableness of the Authority's bridge tolls. Not only did the Court of Appeals find that the District Court's factual findings were not "clearly erroneous", the appellate court expressly "agree[d]" (A-28) with the trial court's findings.

Petitioners do not dispute that the courts below were correct in analyzing the reasonableness of the Port Authority's bridge tolls by following the "systemwide" approach to ratemaking used in public utility cases. *See, e.g., Natural Gas Pipeline Co. v. FERC*, 765 F.2d 1155, 1164 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986). Rather, petitioners attempt to rely on two previous bridge toll cases, *City of Burlington v. Turner*, 471 F.2d 120 (8th Cir. 1973),

and *Automobile Club of New York, Inc. v. Cox*, 592 F.2d 658 (2d Cir. 1979).

Petitioners' attempted reliance on *City of Burlington* is misplaced since that case involved the use of bridge toll revenues to provide salary increases for the city's policemen and firemen, a purpose which admittedly was unrelated to the city's bridge.

Similarly unavailing is petitioners' attempted reliance on the *Cox* court's description of including PATH in the rate base as a "giant leap" (A-30). First, as pointed out by both the District Court and the Court of Appeals, "the *Cox* court did, in fact, take that leap" (A-31), and unanimously affirmed a District Court decision that the Port Authority's bridge tolls were "reasonable and just" within the meaning of the Bridge Act of 1906, 33 U.S.C.A. §494 (West 1986), based on a rate of return calculation that *included* PATH in the rate base. Second, based on the different factual record in the instant case, the Court of Appeals expressly and succinctly stated that:

> "[W]e find it easier to sustain the Port Authority's position today than the panel did ten years ago" (A-31),

and that:

> ". . . [t]his case has indeed changed during the past ten years, but in the opposite direction [than as claimed by petitioners]; *the facts in the record* now make it easier for us to conclude that PATH should be included in the rate base." (A-37, emphasis added).[2]

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[2] Petitioners' references to purported plans for future toll and fare increases are, of course, irrelevant and completely outside this record. In any event, the Port Authority has not taken any action with respect to any such increases.

Finally, inasmuch as both opinions below were based on the specific "facts in the record" in this case, it is difficult to understand petitioners' characterization of the issues in this case as involving matters of "national importance." The decision which petitioners seek to overturn is applicable only to the facts in this record relating to the Interstate Transportation Network owned and operated by The Port Authority of New York and New Jersey. Contrary to petitioners' contention that:

> "this Court's construction of the just and reasonable clause in the context of this case will impact *upon every one* of the ninety-four bridges whose tolls are now subject to the just and reasonable test . . . ." (Petition, at 28, emphasis added),

the facts are that the vast majority of these bridges are individual crossings, such as the bridge involved in *City of Burlington*. Unlike the Port Authority's bridges, they are not part of any integrated transportation network. Indeed, only one of the owners of these bridges, the Delaware River Port Authority, operates a passenger rail crossing. Clearly, therefore, the decision below is not of national importance.

In view of petitioners' failure to show: that the Court of Appeals incorrectly resolved the narrow, fact-driven issues before it; that the Court of Appeals decision conflicts with any decision of this Court or that of any other court of appeals; or that this case involves issues of national importance, the petition for a writ of certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Denied.

Respectfully submitted,

JOSEPH LESSER
(Counsel of Record)
The Port Authority of New York and New Jersey
One World Trade Center - 66N
New York, New York 10048
(212) 466-8754

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ARTHUR P. BERG
MILTON H. PACHTER
SHOLEM FRIEDMAN

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